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No. 07-1454

In the Supreme Court of the United States

FASHION VALLEY MALL, LLC, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether this Court has jurisdiction pursuant to 28 U.S.C. 1257(a) to undertake direct review of a state supreme court opinion answering a question of state law certified to it by a federal court of appeals, where the court of appeals retained jurisdiction to decide the federal questions presented in the case, and where the federal question on which petitioner seeks review was neither timely pressed nor passed upon by the state supreme court.

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OPINIONS BELOW

The opinion of the Supreme Court of California answering a question of state law certified to it by the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1-53) is reported at 172 P.3d 742. The opinion of the court of appeals enforcing the order of the National Labor Relations Board (Board) after receiving the answer of the California Supreme Court to the court of appeals' certified question (App., *infra*, 1a-5a) is reported at 524 F.3d 1378. The order of the court of appeals certifying the question of state law to the Supreme Court of California (App., *infra*, 8a-22a) is reported at 451 F.3d 241. The decision and order of the Board (App., *infra*, 23a-33a) are reported at 343 N.L.R.B. 438.

JURISDICTION

The opinion of the Supreme Court of California, answering a certified question of state law, was entered on December 24, 2007. A petition for rehearing was denied on February 20, 2008 (Pet. App. 54). The petition for a writ of certiorari was filed on May 20, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a). For reasons explained below, however (see pp. 8-17, *infra*), this Court lacks jurisdiction because the interlocutory decision of the California Supreme Court answering a certified question of state law, which does not address the federal constitutional question petitioner raised for the first time in its petition for rehearing, is not a "[f]inal judgment[]" deciding a "right * * * specially set up or claimed under the [United States] Constitution," 28 U.S.C. 1257(a).

STATEMENT

1. An employer that has, under state law, a right to exclude others from its property does not generally violate the National Labor Relations Act (NLRA or the Act), 29 U.S.C. 151 *et seq.*, when it prevents nonemployees from entering upon its property to distribute union literature. See *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 537-538 (1992). When an employer lacks such a state-law right, it violates Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by excluding or seeking to exclude nonemployees engaged in activity protected by Section 7 of the NLRA, 29 U.S.C. 157.[1] See *NLRB* v. *Calkins*,

[1] Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act, 29 U.S.C. 157, which in turn ensures the right of employees "to self-organization, to form, join, or assist labor organizations, to bargain

187 F.3d 1080, 1083, 1095-1096 (9th Cir. 1999), cert. denied, 529 U.S. 1098 (2000). See generally *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 217 n.21 (1994) ("The right of employers to exclude union organizers from their private property emanates from state common law."). The Board therefore looks to state law to ascertain whether an employer has a property right sufficient to deny access to nonemployee individuals engaged in activity protected by Section 7 of the NLRA. *Glendale Assocs., Ltd.*, 335 N.L.R.B. 27, 28 (2001), enforced, 347 F.3d 1145 (9th Cir. 2003).

2. Petitioner owns a large shopping mall in San Diego, California. Pet. App. 2, 3 n.2. Petitioner permits certain expressive activities in the common areas of the mall by those who apply for a permit and agree to abide by its regulations. *Id.* at 3-4. One such regulation, Rule 5.6.2, requires permit applicants to refrain from "[u]rging, or encouraging in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center." *Id.* at 4.

In October 1998, approximately 30 members and supporters of the Graphic Communications International Union (Union) gathered outside a department store in the mall to distribute handbills advertising the Union's labor dispute with a local newspaper. Pet. App. 2-3. The Union decided to stage a protest at the mall because the department store advertises in the newspaper and is located near the newspaper's premises. *Id.* at 3. Shortly after the handbilling began, a representative of the mall approached the protestors, explained that a permit

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collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

was required for their expressive activity, and told them to leave the premises. *Ibid.*

3. Acting on an unfair labor practice charge filed by the Union, the Board's General Counsel issued a complaint, alleging, *inter alia*, that petitioner violated Section 8(a)(1) by prohibiting participants in expressive activity from urging customers to refrain from shopping at stores located in the mall. *Equitable Life Assurance Soc'y of the U.S. & ITC Fashion Valley Corp.*, 343 N.L.R.B. 438, 441 (2004). After a hearing, an administrative law judge (ALJ) issued a decision finding that petitioner violated Section 8(a)(1) by enforcing Rule 5.6.2 and unlawfully excluding the union handbillers. *Id.* at 449.

On review, the Board issued an opinion and order, App., *infra*, 23a-33a, affirming the ALJ's finding of that unfair labor practice, *id.* at 29a. Ruling on a separate allegation on which the ALJ had declined to rule, the Board also found that petitioner's maintenance of the rule violated Section 8(a)(1). *Id.* at 28a.

After acknowledging that property owners generally do not violate the Act by exercising their state-law property right to exclude nonemployee union organizers from private property, the Board analyzed California law to determine whether it granted petitioner the right to exclude individuals advocating a boycott of a mall business. App., *infra*, 27a-28a. The Board concluded that California law did not grant the mall owner that right. *Id.* at 28a. In so concluding, the Board relied on the California Supreme Court's decision in *Robins* v. *Pruneyard Shopping Center*, 592 P.2d 341 (1979) (*Pruneyard*), aff'd, 447 U.S. 74 (1980), which held, construing state property law in light of the State's constitution, that private shopping centers that were other-

wise open to the public could not prevent individuals from engaging in speech or petitioning, subject to reasonable time, place, and manner rules adopted by the property owner. App., *infra*, 28a. Applying that decision, the Board determined that petitioner's Rule 5.6.2 was invalid under California law as a content-based restriction on access to a shopping mall otherwise open to the public, and therefore concluded that petitioner violated Section 8(a)(1) by maintaining the rule and by requiring the Union to adhere to it as part of the permit process. *Id.* at 28a-29a.

4. Petitioner sought review of the Board's order before the United States Court of Appeals for the District of Columbia Circuit, and the Board cross-applied for enforcement of its order. After briefing and oral argument, the court of appeals issued an opinion, App., *infra*, 8a-22a, concluding that "no California court has squarely decided whether a shopping center may lawfully ban from its premises speech urging the public to boycott a tenant." *Id.* at 18a. The court therefore certified the following question to the Supreme Court of California: "Under California law may [petitioner] maintain and enforce against the Union its Rule 5.6.2?"[2] *Id.* at 19a. The court further stated that it would "hold this case in abeyance pending a response from that court." *Ibid.*

5. The Supreme Court of California granted the D.C. Circuit's request. The Board did not file a brief or appear at oral argument before the California Supreme Court, but instead filed a letter with the clerk of the court explaining that the Board "has no institutional

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[2] That action was authorized by California Rule of Court 8.548(a), which provides that a court of appeals may certify "a question of California law if: (1) [t]he decision could determine the outcome of a matter pending * * * and (2) [t]here is no controlling precedent."

interest in how California resolves the state property law question" that the D.C. Circuit had certified. App., *infra*, 35a. Rather, the letter explained, the Board had in its order "merely attempt[ed] to give effect to its understanding of California property law." *Ibid.*

In a decision dated December 24, 2007 (Pet. App. 1-53), the Supreme Court of California held that, under its decision in *Pruneyard*, the property rights of a mall owner to exclude members of the public are limited by "the right to free speech granted by article I, section 2 of the California Constitution[, which] includes the right to urge customers in a shopping mall to boycott one of the stores in the mall." *Id.* at 1, 7-8. Analyzing *Pruneyard* and California Supreme Court decisions that preceded it (*id.* at 7-18), the court concluded that it had long been the law of the State, "and remains the law, that a privately owned shopping center must permit peaceful picketing of businesses in shopping centers, even though such picketing may harm the shopping center's business interests." *Id.* at 19. The court therefore answered the certified question as follows: "We hold * * * [petitioner] may not maintain and enforce against the Union its rule 5.6.2." *Id.* at 31. Three members of the court dissented, contending that the court "should overrule *Pruneyard*" or at least distinguish it. *Id.* at 35. .

Petitioner sought rehearing before the California Supreme Court. In its petition for rehearing, petitioner argued for the first time that the court's answer to the certified question resulted in a taking of its property in violation of the Fifth Amendment to the United States Constitution. Pet. for Reh'g 2-9. The California Supreme Court denied rehearing without comment on February 20, 2008. Pet. App. 54.

6. Although not mentioned in the petition for a writ of certiorari, on May 9, 2008, before the petition was filed, the D.C. Circuit issued an opinion and order enforcing the Board's order in light of the California Supreme Court's decision and declining to address petitioner's Takings Clause argument on the ground that it had been waived. App., *infra*, 1a-5a.

Shortly after the Supreme Court of California issued its decision on December 24, 2007, answering the certified question, the D.C. Circuit had issued an order directing petitioner to "show cause * * * why the court should not deny its petition for review and grant the Board's cross-application for enforcement." App, *infra*, 7a. In its response, petitioner advanced its takings argument, acknowledging that the California Supreme Court had denied the petition for rehearing in which petitioner had raised the issue for the first time. See *id.* at 2a.

In its May 9, 2008, decision granting the Board's application for enforcement of its order and denying petitioner's petition for review, the court of appeals did not address the merits of petitioner's takings argument. Rather, the court held that petitioner had "forfeited its constitutional argument" by not asserting it initially in the petition for review of the Board's decision. App, *infra*, 3a. The court rejected petitioner's contention that the issue could not have been raised earlier, observing that "the decision of the Supreme Court of California did not inject any new constitutional issue into the case," because that court had "merely confirmed that the interpretation of California law long followed by the Board was correct." *Id.* at 4a. The court of appeals noted that if petitioner had raised the constitutional issue in its petition for review of the Board's decision, that

fact might have affected the court of appeals' decision to certify the question of state law or the California Supreme Court's answer to that question. *Ibid.*

ARGUMENT

The opinion of the Supreme Court of California answering a question of state law certified to it by the court of appeals is not a "[f]inal judgment[] or decree[]" within the meaning of 28 U.S.C. 1257(a), the jurisdictional provision that governs this Court's review of state-court decisions. Nor did the state court's opinion decide "any title, right, privilege, or immunity * * * specially set up or claimed under the Constitution or the treaties or statutes of * * * the United States." *Ibid.* Because this Court lacks jurisdiction to review the question of state law addressed by the Supreme Court of California's interlocutory opinion, the petition for a writ of certiorari should be denied.

1. This Court's jurisdiction to review state-court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of * * * the United States." 28 U.S.C. 1257(a). That provision embodies a "firm final judgment rule," *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997), and "is not one of those technicalities to be easily scorned," *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945). Rather, faithful adherence to the rule is "an important factor in the smooth working of our federal system." *Ibid.* To satisfy Section 1257(a), a state-court decision must be final in two senses: first, it "must be subject to no further review or correction"; and, second, it must be "an effective deter-

mination of the litigation and not of merely interlocutory or intermediate steps therein." *Market St. Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 551 (1945).

The opinion of the California Supreme Court answering the question of state law certified to it by the court of appeals is not a final judgment under Section 1257(a). Answering only the question certified to it by the D.C. Circuit, the state supreme court clarified the pertinent issue of state law by holding that, under the state constitution, a shopping mall may not prohibit expressive activity urging a consumer boycott of a mall tenant. Pet. App. 30-31. That decision did not, nor could it, terminate the controversy pending between the parties in the D.C. Circuit—over which the D.C. Circuit explicitly retained jurisdiction and which the California Supreme Court could not decide—whether petitioner violated Section 8(a)(1) of the NLRA and whether the Board's order against petitioner should be enforced. App., *infra*, 18a-19a; see Richard Fallon, Jr. et al., *Hart and Wechsler's the Federal Courts and the Federal System* 1200-1201 (5th ed. 2003) (certification procedures "permit federal courts, while retaining jurisdiction of a case, to seek a state court's authoritative resolution of unsettled state law issues"). Accordingly, the California Supreme Court's decision pursuant to the court of appeals' certification was merely an "intermediate step[]," not the "final word," in the litigation. *Jefferson*, 522 U.S. at 81 (quoting *Market St. Ry.*, 324 U.S. at 551).

Although this Court in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 479-485 (1975), identified four categories of state-court decisions that can be final under Section 1257(a) notwithstanding the pendency of proceedings on remand in lower state courts, *Cox* is inappli-

cable here.[3] The four *Cox* categories identify situations in which the state court has decided a federal issue, and, absent certiorari, there would be no timely or meaningful federal court review of the federal claim. See *Florida* v. *Thomas*, 532 U.S. 774, 778-780 (2001) (summarizing the situations in which the *Cox* exceptions permit review). Here, no question of federal law was certified to or decided by the state court. Indeed, the certification procedure does not contemplate that the state court will decide federal issues, for as this Court has observed, "certified questions should be confined to uncertain questions of state law." *City of Houston* v. *Hill*, 482 U.S. 451, 471 n.23 (1987) (noting that it would be "inappropriate for a federal court to certify [an] entire constitutional challenge to the state court"). Although the California Supreme Court could have taken federal constitutional constraints into consideration in construing state law, the federal court that certified the question of state law retains jurisdiction to decide all properly preserved federal questions in the case, subject to review

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[3] The categories are (1) "cases in which there are further proceedings * * * yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained," (2) "cases * * * in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings," (3) "situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case," or (4) "situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, * * * and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Cox*, 420 U.S. at 479-483.

by this Court. See, *e.g.*, *Government & Civic Employees Org. Comm.* v. *Windsor*, 353 U.S. 364, 366-367 (1957) (per curiam) (remanding to a federal three-judge district court a First Amendment challenge to a state law prohibiting public employees from joining a union "*with directions to retain jurisdiction* until efforts to obtain an appropriate adjudication in the state courts" interpreting the state statute in question in light of the union's federal Constitutional arguments "have been exhausted" (emphasis added)).[4]

The state supreme court's answer to a question of state law certified to it by a federal court has no immediate impact on the rights of the litigants, any more than if the federal court had undertaken itself to answer the state law issue at an interlocutory stage of the case instead of certifying it to the state supreme court. And

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[4] *Windsor* arose under the procedures announced in *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941) (*Pullman*), under which a federal court may abstain from resolving a federal question by encouraging the initiation of a state-court proceeding in which a final ruling on an issue of state law may moot the federal question. *Id.* at 501. Because, under *Pullman*, an independent state-court action is initiated, see *ibid.*, it is sometimes possible for a party to "elect[] to seek a complete and final adjudication of [its] rights in the state courts," including its federal constitutional rights, *NAACP* v. *Button*, 371 U.S. 415, 427 (1963). In such a case, this Court would have jurisdiction pursuant to Section 1257(a) to review the federal question decided by the final judgment of the state court. See *Id.* at 427. In contrast, as we explain in the text, pp. 9-14, the answer provided by a state court to a certified question is not a final judgment deciding the rights of the parties, but an interlocutory step preceding a final adjudication of the parties' rights by the federal court that retains jurisdiction. And, in any event, petitioner, which did not raise its federal constitutional argument in the California Supreme Court until its petition for rehearing, plainly did not seek a "complete and final" adjudication of its constitutional rights in that court. See pp. 14-17, *infra*.

such an interlocutory resolution of a state law issue might ultimately have no adverse effect on the party challenging it if the federal court later rules on final judgment in that party's favor on *other* grounds—including that the interpretation of state law results in a violation of the federal Constitution.

Moreover, to allow direct review in this Court of a state court's answer to a certified question of state law in the midst of ongoing federal litigation would disrupt the certification procedure and undermine its core policies of comity and judicial economy. Certification is meant to provide a less cumbersome alternative to abstention by "allow[ing] a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 76 (1997). If this Court were to entertain direct certiorari review where a state court's response to a certified question of state law arguably raises a federal question, the resulting delay in the ultimate resolution of the case or the possibility of piecemeal litigation could dissuade federal courts from utilizing the procedure. In that event, federal courts are more likely to risk the kinds of "friction-generating error[s]" that result when federal courts attempt to rule on novel issues of state law without the authoritative guidance of the states' highest courts. *Id.* at 79.

The proper course for petitioner thus would have been to raise its federal Takings Clause challenge to the purported state-law limitation on its property rights in the federal court of appeals in which the enforcement proceeding was pending and then petition for a writ of certiorari from that court's final judgment if necessary.

See, *e.g.*, *Toll* v. *Moreno*, 441 U.S. 458, 462 (1979) (per curiam) (remanding case to federal district court to consider in the first instance questions of federal law raised by clarification of state law after certification by this Court to the Maryland Court of Appeals). In this case, however, petitioner forfeited its constitutional argument in the federal court of appeals by failing to raise the issue in a timely fashion. App., *infra*, 3a. As the court of appeals held, petitioner should have raised its Takings Clause claim at the outset in its petition for review from the Board's order, which construed California law in the same way the California Supreme Court ultimately did. *Id.* at 3a-4a.[5] If petitioner had done so, that claim could have been taken into account by the D.C. Circuit in deciding whether to certify the state-law issue, and by the California Supreme Court in answering that question. See *id.* at 4a.

Petitioner did not file a petition for a writ of certiorari challenging the court of appeals' May 2008 judgment enforcing the Board's order on the ground that it resulted in a taking of petitioner's property without just compensation, and any such petition would have failed

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[5] The court of appeals did not decide whether petitioner forfeited its constitutional argument for the additional reason that petitioner had failed to raise it before the Board in the first instance. App., *infra*, 2a-3a. Section 10(e) of the Act, 29 U.S.C. 160(e), deprives an appellate court, including this Court, of jurisdiction to review any issue not raised before the Board. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). That bar applies even to those belated challenges to a Board order that are constitutional in nature. See *International Ladies' Garment Workers' Union, Upper S. Dep't* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (holding that party's due process challenge was barred by Section 10(e)); *Polynesian Cultural Ctr., Inc.* v. *NLRB*, 582 F.2d 467, 473 (9th Cir. 1978) (same with regard to party's First Amendment challenge).

in light of petitioner's forfeiture of its Takings Clause argument. See *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416-417 (2001) (declining to permit petitioner to assert new substantive arguments attacking the judgment when those arguments were not pressed or passed on by the court below). Although petitioner's forfeiture of its federal constitutional claim in the federal court where the enforcement proceeding was pending would have caused this Court to deny a petition for review from the court of appeals, plainly that consequence of petitioner's waiver gives petitioner no greater claim to "finality" with respect to the state court's opinion answering the certified question of state law.[6]

2. Even assuming that the opinion of the California Supreme Court is a final judgment for purposes of Section 1257(a), the petition for a writ of certiorari should be denied for a second, independent reason—petitioner failed to present in a timely fashion its federal constitutional claim to the state court, which did not address it. Section 1257(a) grants this Court jurisdiction to review the final judgment of a state court "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of * * * the United States." 28 U.S.C. 1257(a).

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[6] In its response to the court of appeals' order to show cause, petitioner urged the court of appeals to stay its proceedings, in order to give this Court the "first opportunity," through a petition for a writ of certiorari to the California Supreme Court that had yet to be filed, "to resolve the U.S. Constitutional issues raised by the manner in which the California Supreme Court answered [the court of appeals'] certified question." 04-1411 Pet. Resp. to Order to Show Cause 6-7 (D.C. Cir.). That suggestion inverts the proper order. The lower courts should first have an opportunity to address the constitutional question, or resolve the case on other grounds and thereby obviate the need for the constitutional issue to be resolved.

Because petitioner did not raise its constitutional claim before the state court in a timely fashion, review by this Court under Section 1257(a) would be inappropriate.[7]

This Court has long "adhered to the rule in reviewing state-court judgments under 28 U.S.C. § 1257(a) that [it] will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision [the Court has] been asked to review." *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (per curiam); see *Howell* v. *Mississippi*, 543 U.S. 440, 443 (2005) (per curiam); *Webb* v. *Webb*, 451 U.S. 493, 496-497 (1981). Because the California Supreme Court decision "is silent on [the] federal question," this Court will "assume that the issue was not properly presented" unless petitioner carries "the burden of defeating this assumption." *Adams*, 520 U.S. at 86-87. Petitioner fails to carry that burden here.

Petitioner concedes that it did not raise the issue until its petition for rehearing in the California Supreme Court. Pet. 11-12. As such, that argument was procedurally defaulted under that court's "well settled" rule that it will not entertain arguments "raised for the first time in a petition for rehearing." *Reynolds* v. *Bement*, 116 P.3d 1162, 1172-1173 (Cal. 2005) (citation omitted). The California Supreme Court denied the petition for rehearing without comment. Pet. App. 54. This Court

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[7] Many decisions of the Court have discussed the requirement that a federal question be pressed or passed upon by the state court as a jurisdictional limitation under Section 1257(a) and its statutory antecedents. See, *e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Duel*, 324 U.S. 154, 160 (1945); *Crowell* v. *Randell*, 35 U.S. (10 Pet.) 368, 392 (1836) (Story, J.). More recently, the Court has declined to decide whether the rule is "jurisdictional or prudential." *Adams* v. *Robertson*, 520 U.S. 83, 90 (1997) (per curiam); see *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); *Illinois* v. *Gates*, 462 U.S. 213, 219 (1983).

has consistently assumed that a state court's silence in the face of belatedly-raised issues is "due to want of proper presentation." *Board of Dirs. of Rotary Int'l* v. *Rotary Club*, 481 U.S. 537, 549-550 (1987) (*Rotary Int'l*) (quoting *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 181 n.3) (1983)). Accordingly, this Court will "refuse[] to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question." *Adams*, 520 U.S. at 89-90 n.3 (citing *Rotary Int'l*, 481 U.S. at 549-550; *Hanson* v. *Denckla*, 357 U.S. 235, 244 n.4 (1958); *Radio Station WOW*, 326 U.S. at 128).

Petitioner nonetheless urges, relying on this Court's decision in *Cox*, that by presenting its Takings Clause argument to the California Supreme Court in the petition for rehearing, petitioner preserved the issue for this Court's review. Pet. 1-2. In *Cox*, however, the state court's denial of rehearing was accompanied by the statement that "[a] majority of this court does not consider this statute to be in conflict with the [U.S. Constitution]." 420 U.S. at 476 (citations omitted). The absence of any comment from the California Supreme Court on the merits of the constitutional issue on which petitioner seeks review by this Court distinguishes this case from *Cox*. See Eugene Gressman et al., *Supreme Court Practice* 193-194 (9th ed. 2007) ("To constitute a reviewable judgment" under Section 1257(a), "the order denying the petition for rehearing must be more than a cursory recitation that the petition has been fully or maturely considered," rather, "[t]here must be language indicating that the federal question was considered and disposed of.").

Moreover, although this Court has indicated that a party adequately preserves a federal claim if it presents it upon its first opportunity, such as "when the highest

state court renders an unexpected interpretation of state law or reverses its prior interpretation," *Prune-Yard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 86 n.9 (1980), that rule is of no benefit to petitioner here. In *Prune-Yard Shopping Center*, the Court held that the mall owners were not barred from raising a federal constitutional claim by their failure to raise that claim before the lower state courts, which were bound by state supreme court precedent favorable to the mall owners. *Id.* at 86-87 n.9. The Court noted, however, that "[o]nce before the California Supreme Court," which had the power to overrule that precedent, the mall owners "explicitly presented their federal constitutional right" in their brief. *Ibid.* Here, by contrast, petitioner failed to assert its federal right before the California Supreme Court until the petition for rehearing, even though the Board's decision, which tracked the analysis of the California Supreme Court's own opinion in relevant regard, had already found that California law protected the right of the picketers to urge a boycott of a mall tenant. App., *infra*, 27a-29a. As the D.C. Circuit stated, in holding that petitioner had waived its constitutional argument in the D.C. Circuit as well by failing to raise it initially in its petition for review from the Board's decision, "the decision of the Supreme Court of California did not inject any new constitutional issue into the case," but rather "merely confirmed that the interpretation of California law long followed by the Board was correct." *Id.* at 4a.

3. As noted above, the Board did not participate in briefing or argument before the California Supreme Court because, as the Board explained, the NLRA merely gives effect to state property law, and the Board therefore "has no institutional interest in how California

resolves the state property law question" that the D.C. Circuit certified. App., *infra*, 35a.

Although the Board has no interest in the resolution of the question of state law per se, we note that petitioner's disagreement with the state court's construction of state law does not rise to the level of a federal constitutional violation. Just as the Board takes state-law property rights as the starting point of its analysis, this Court takes "the restrictions that background principles of the State's law of property and nuisance already place upon land ownership" as the baseline against which a Takings Clause challenge under the federal Constitution is measured. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). Even if a state supreme court's judgment might violate the Fifth Amendment if it were merely a "pretext[]" for "eliminat[ing] property rights," see *Stevens* v. *City of Cannon Beach*, 510 U.S. 1207, 1211 (1994) (Scalia, J., dissenting from the denial of certiorari); see also *Lucas*, 505 U.S. at 1031 (citing *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980)), no such claim could be made here.

The California Supreme Court construed state property law in light of language that has been part of the California Constitution without substantive change since its original adoption in 1849. Compare Cal. Const. Art. 1, § 2(a), with Cal. Const. of 1849, Art. 1, § 9. The question presented, both before the Board and the California Supreme Court, was the proper construction of that constitutional guarantee in light of the state court's 1979 *Pruneyard* decision, which this Court affirmed, *PruneYard Shopping Ctr.*, 447 U.S. at 88. See Pet. App. 7-9;

App., *infra*, 27a-28a.[8] Even the dissenters in the California Supreme Court characterized the question as whether the court "should overrule *Pruneyard*" or else distinguish it. Pet. App. 35. This is hardly a case, therefore, in which a state court has "by *ipse dixit* * * * transform[ed] private property into public property without compensation." *Lucas*, 505 U.S. at 1031 (quoting *Webb's Fabulous Pharmacies*, 449 U.S. at 164).

Accordingly, even if petitioner could overcome the obstacles to certiorari resulting from its failure to file a certiorari petition to review the operative final judgment of the D.C. Circuit in this case—and from its failure to raise the federal constitutional issue in a timely manner before either the D.C. Circuit or the California Supreme Court—review by this Court would not be warranted.

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[8] The California Supreme Court found that its conclusion regarding the question presented was supported by other California decisions that predated *Pruneyard* by as much as fifteen years. See Pet. App. 19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1411
Consolidated with
05-1027 & 05-1039

FASHION VALLEY MALL, LLC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

GRAPHIC COMMUNICATIONS CONFERENCE,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 432(M), INTERVENOR

Argued: Dec. 13, 2005
Decided: May 9, 2008

ON PETITION FOR REVIEW AND APPLICATION AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: SENTELLE, Chief Judge, GINSBURG, Circuit Judge, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

Fashion Valley owns a shopping mall in San Diego, California. It allows individuals and organizations to engage in expressive activities on its premises if they get a permit; in order to get a permit, an applicant must promise not to urge consumers to boycott any of the mall's tenants. The NLRB concluded this policy violated the right to free speech guaranteed by the Constitution of California and therefore held it was an unfair labor practice; Fashion Valley petitioned this court for review. We agreed that "whether Fashion Valley violated the [National Labor Relations] Act depends upon whether it had the right, under California law, to maintain and enforce its anti-boycott rule." 451 F.3d 241, 242 (2006). Accordingly, we certified that question to the Supreme Court of California, which held Fashion Valley's policy violated the right to free speech guaranteed by the Constitution of California, 42 Cal. 4th 850, 69 Cal. Rptr. 3d 288, 172 P.3d 742 (2007), and later denied Fashion Valley's petition for rehearing.

Fashion Valley now claims the interpretation of the Constitution of California requiring it to allow protesters on its premises to urge a boycott of its tenants' stores violates its rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. It concedes, however, that it did not raise its constitutional argument until it petitioned the Supreme Court of California for rehearing. The Board argues the argument is forfeit because Fashion Valley did not raise it during the agency proceeding.

Whether Fashion Valley was required to raise its argument before the Board is not clear. "[T]here is [no] bright-line rule allowing litigants to bypass administrative [process] simply because one or all of their claims

are constitutional in nature," *Marine Mammal Conservancy, Inc. v. Dep't of Agric.*, 134 F.3d 409, 413 (D.C. Cir. 1998), but we have stated we may excuse a failure to exhaust administrative remedies when exhaustion would be "futile" because a claim involves "the constitutionality of a [federal] statutory provision" and would therefore be "beyond [the agency's] competence to decide." *Ryan v. Bentsen*, 12 F.3d 245, 247 (D.C. Cir. 1993). The Board has never said it lacks jurisdiction to decide whether a state law is constitutional, *cf. Univ. of Great Falls*, 331 NLRB No. 188, 2000 WL 1283042 at *2 (2000) (holding it beyond Board's authority to pass upon constitutionality of a federal statute), *vacated on other grounds*, 278 F.3d 1335 (D.C. Cir. 2002), but clearly it has been disinclined to do so. *Waremart Foods*, 337 NLRB 289, 289 (2001) ("[W]e decline the Respondent's invitation to independently evaluate the constitutionality of the State law"), *vacated on other grounds*, 354 F.3d 870 (D.C. Cir. 2004); *Varied Enters. v. Crowder*, 240 NLRB 126, 132 (1979) ("It is the general rule of law that a state statute is presumed to be constitutional until it is repealed by the legislature, or until its nullity is declared by a court of competent jurisdiction").

We need not wade into such murky waters in this case: We have no doubt Fashion Valley forfeited its constitutional argument because it did not raise that argument in its petition for review by this court. *See, e.g., Nat'l Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1273 (D.C. Cir. 1998) ("[Petitioner] failed in its opening brief to this court to contest the Board's finding. . . . Consequently, that claim is waived"). Fashion Valley could and should have argued that if the Board's understanding of California's constitutional guarantee of free speech was correct, then that free speech provision, as

applied, violated the Constitution of the United States. Having that argument before us would have facilitated our decision to certify the question of state law to the Supreme Court of California. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 79, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) (noting that certification is especially appropriate "when a federal court is asked to invalidate a State's law" because the federal court "risks friction-generating error"). More important, with that argument a part of the case, the Supreme Court of California might have made a special effort to construe the state constitution so as to avoid any potential conflict with federal constitutional law.

Fashion Valley resists this conclusion, contending "it would have been impossible for [it] to have presented, or for the Board to have resolved, U.S. Constitutional issues created by a decision which had not yet been issued." But the decision of the Supreme Court of California did not inject a new constitutional issue into the case. The Board's understanding of California law had been part of this case from the time the Board's General Counsel filed the first brief before the Board; the Supreme Court of California merely confirmed that the interpretation of California law long followed by the Board was correct. *See, e.g., Glendale Assocs.*, 335 NLRB 27 (2001), *enf'd*, 347 F.3d 1145 (9th Cir. 2003); *see also Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980). Fashion Valley had no reason to wait until the Supreme Court of California rendered its decision to pursue its constitutional claim.

Therefore, without deciding whether Fashion Valley was required to raise its constitutional argument before

the Board in the first instance, we hold the argument is forfeit because it was not timely raised before this court. Fashion Valley's petition for review is accordingly denied and the Board's cross-application for enforcement is granted.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 04-1411
Consolidated with 05-1027, 05-1039

FASHION VALLEY MALL, LLL., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

[Filed: Dec. 31, 2007]

ORDER

BEFORE: GINSBURG, Chief Judge, SENTELLE, Circuit Judge, and WILLIAMS, Senior Circuit Judge

Fashion Valley Mall, LLC petitioned for review, and the National Labor Relatiosn Board cross-applied for enforcement, of the order in *Equitable Life Assurance Society of the United States, et al.*, 343 N.L.R.B. 438 (2004). This court certified to the Supreme Court of California the question whether *Fashion Mall, LLC v. NLRB*, 451 F.3d 241, 246-47 (D.C. Cir. 2006).

Upon consideration of the decision of the Supreme Court of California holding Fashion Valley's policy violates the Constitution of California, *Fashion Valley*

Mall, LLC v. NLRB, No. S144753, ____ Cal. Rptr. 3d ____, 2007 WL 4472241 (Dec. 24, 2007), it is

ORDERED, on the court's own motion, that petitioner show cause, within 30 days of the date of this order, why the court should not deny its petition for review and grant the Board's cross-application for enforcement. Petitioner's response to this order may not exceed ten pages.

The Clerk is directed to send a copy of this order to petitioner both by certified mail, return requested, and by first class mail.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ LINDA JONES
LINDA JONES
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 04-1411, 05-1027, 05-1039

FASHION VALLEY MALL, LLC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
GRAPHIC COMMUNICATIONS CONFERENCE,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 432(M), INTERVENOR

Argued: Dec. 13, 2005
Decided: June 16, 2006

ON PETITIONS FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: GINSBURG, Chief Judge, and SENTELLE, Circuit Judge, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Chief Judge GINSBURG.

Concurring opinion by Senior Circuit Judge WILLIAMS.

GINSBURG, Chief Judge.

Fashion Valley Mall, LLC, which is owned and operated by the Equitable Life Assurance Society and ITC Fashion Valley Corporation, allows individuals and organizations to engage in expressive activities on its premises if they first get a permit from the Mall. In order to receive a permit, a party must agree to abide by Fashion Valley's rules and regulations, which prohibit urging consumers to boycott any of the Mall's tenants. The National Labor Relations Board held Fashion Valley violated § 8(a)(1) of the National Labor Relations Act both by maintaining this requirement and by excluding from its premises certain union handbillers.

We hold that whether Fashion Valley violated the Act depends upon whether it had the right, under California law, to maintain and enforce its anti-boycott rule. Because the underlying question is one of state law as to which we can only speculate, we certify that question to the Supreme Court of California for an authoritative answer.

I. Background

Fashion Valley owns a large shopping mall in San Diego, California. The Company permits expressive activities by those who apply for a permit and agree to abide by its regulations. An applicant for a permit must state the purpose of the proposed expressive activity; submit a copy or a description of any materials and signs to be used; list the individual(s) who will participate; provide a $50.00 refundable cleaning deposit; purchase insurance as necessary; and, per Rule 5.6.2, agree to abstain from:

> Urging, or encouraging in any manner, customers not to purchase the merchandise or services offered

by any one or more of the stores or merchants in the shopping center.

In October 1998 approximately 30 "members and supporters" of the Graphic Communications International Union gathered outside the Robinsons-May department store at the Mall to protest actions taken by The San Diego Union-Tribune newspaper. The Union decided to stage to protest there because the store advertises in the paper and is located not far from the paper's premises.

The protestors distributed a handbill addressed" Dear customer of Robinsons-May" that outlined the Union's grievances against the newspaper while making clear "[t]o the employees of Robinsons-May . . . [the] dispute is with The San Diego Union-Tribune. We are not asking you to cease working for your employer." The Union encouraged patrons and employees only to "[c]all Gene Bell, CEO at the Union Tribune." In closing, the handbill mentioned that "Robinsons-May advertises with the Union-Tribune." After about 15 minutes a representative of Fashion Valley approached the protestors, explained that a permit was required for expressive activity, and told them to leave the premises, which they did.

Thereafter, instead of applying for a permit, the Union filed a charge with the Board alleging that Fashion Valley had violated § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), which makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act, to wit,

> . . . the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

29 U.S.C. § 157. An Administrative Law Judge held the Company had violated § 8(a)(1), and the Board affirmed, albeit on a different ground. The Board reasoned:

> [We] look[ ] to State law to ascertain whether an employer has a property right sufficient to deny access to nonemployee union representatives. . . . [A]n employer cannot exclude individuals exercising Section 7 rights if the State law would not allow the employer to exclude the individuals. . . . California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner rules adopted by the property owner. . . . Rule 5.6.2, however, is essentially a content-based restriction and not a time, place, and manner restriction permitted under California law. . . . [T]he purpose and effect of this rule was to shield [Fashion Valley's] tenants, such as the Robinsons-May department store, from otherwise lawful consumer boycott handbilling. Accordingly, we find [Fashion Valley] violated Section 8(a)(1) by maintaining Rule 5.6.2.

Equitable Life Assur. Soc'y of the United States, et al., 343 N.L.R.B. No. 57 (Oct. 29, 2004) (internal citations and quotations omitted). The Board also held the Company violated § 8(a)(1) by "requir[ing] [the Union's] adherence to [the] unlawful rule" in its permit application

process. *Id.* Consequently, the Board ordered Fashion Valley to rescind Rule 5.6.2.

II. Analysis

Fashion Valley petitions for review, and the Board cross-applies for enforcement, of the order. We enforce a Board order if the factual findings upon which it rests are supported by "substantial evidence," *see United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998), and the Board's interpretation of the Act is reasonable and consistent with applicable precedent, *see Local 702, Int'l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000). When the Board has occasion to interpret state law, however, our review is ordinarily *de novo*. *See Cellwave Tel. Servs. L.P. v. FCC*, 30 F.3d 1533, 1537 (D.C. Cir. 1994) (no deference afforded to agency interpretation of state law absent agency expertise on the subject).

As mentioned, the Board determined Fashion Valley violated § 8(a)(1) in two ways-first, by "maintaining" Rule 5.6.2 and, second, by "enforcing" Rule 5.6.2 against the Union. In the latter regard, the Board reasoned that "inasmuch as the application process requires adherence to an unlawful rule," Fashion Valley "violated Section 8(a)(1) by enforcing Rule 5.6.2, i.e., by requiring the instant application for a permit." 343 N.L.R.B. No. 57.

In *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 112 S. Ct. 841, 117 L. Ed. 2d 79 (1992), the Supreme Court held it is not a violation of the Act for an employer to bar non-employee union organizers from its property "except in the rare case where the inaccessibility of employees makes ineffective the reasonable attempts by non-em-

ployees to communicate with them through the usual channels." *Id.* at 537-38, 112 S. Ct. 841 (emphasis and internal quotations omitted). Under the Board's reading of *Lechmere*, which Fashion Valley does not dispute, an employer may, without violating § 8(a)(1), exclude a nonemployee union representative from its property if and only if it has that right under state law.* *See Waremart Foods v. NLRB*, 354 F.3d 870, 872 (D.C. Cir. 2004).

Our review of the Board's holding in the present case requires us to resolve two further questions: (1) State law aside, did Fashion Valley's requirement of a permit for expressive activity, conditioned as it was upon the Union's agreement not to urge a boycott of any Mall tenant, violate § 8(a)(1) of the Act? (2) If so, was Fashion Valley acting within its rights under California law?

A. The National Labor Relations Act

Fashion Valley does not challenge the Board's position that maintenance of the anti-boycott rule violated § 8(a)(1) if the rule also violated the laws of California (of which more later). The Company does, however, contest the Board's further determination that Fashion Valley violated the Act a second time when it enforced Rule 5.6.2 by conditioning the Union's demonstration upon its adherence to the Rule. In Fashion Valley's view, there is simply not substantial evidence the Union intended to boycott Robinsons-May or any other Mall tenant; therefore the Union would have received a permit had it applied for one. Further to this point, Fashion Valley ar-

* Fashion Valley does not challenge the Board's assumption that because it is an "employer" within the meaning of § 2(2) of the Act, 29 U.S.C. § 152(2), it may be held liable for interfering with the § 7 rights of the employees of another employer with which it has no agency relationship—a matter upon which we express no opinion.

gues that because its permit application "does not highlight Rule 5.6.2, which only consumes three of the 71 lines included in Article 5," the Board cannot reasonably infer the Union "based its refusal to apply for a permit on Rule 5.6.2" nor, hence, that the rule interfered with § 7 rights.

The Board argues that Fashion Valley interfered with the employees' § 7 rights when it sought to force the Union members to forgo a lawful method of protest. If the Board correctly understands that under California law Fashion Valley did not have the right to exclude the demonstrators, then, the Board maintains, the Mall violated § 8(a)(1).

We agree with the Board. Although Fashion Valley is correct that there is not substantial evidence the Union intended to boycott any of the Mall's tenants, nothing in the Act prohibits the Union from carrying out a secondary boycott by means of peaceful handbilling. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 583-87, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988). In subjecting the Union to a permit process that required it to forswear use of this lawful tactic, therefore, Fashion Valley interfered with the employees' rights under § 7 of the Act. That Rule 5.6.2 comprised only three lines of text is irrelevant; it imposed an unlawful condition for obtaining a permit. Enforcement of Rule 5.6.2 therefore violated § 8(a)(1)—unless, that is, the Company had the right under California constitutional law to exclude the employees altogether. *See Waremart*, 354 F.3d at 872.

B. The Constitution of California

The Supreme Court of California has ruled that "the California Constitution protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, 910, 153 Cal. Rptr. 854, 860, 592 P.2d 341 (1979). Valley therefore seeks refuge in the "reasonably exercised" limitation upon petitioning, pointing out that the Court in *Pruneyard* also said a private shopping center is not required to host expressive activities that "interfere with normal business operations," 153 Cal. Rptr. at 860-61, 592 P.2d 341, and reasoning that Rule 5.6.2 is lawful because it merely protects the Mall "from disruption of normal business operations and TTT interference with customer convenience." *H-CHH Assocs. v. Citizens for Representative Gov't*, 193 Cal. App. 3d 1193, 1208, 238 Cal. Rptr. 841, 850 (1987); *see also Diamond v. Bland*, 3 Cal. 3d 653, 666, 91 Cal. Rptr. 501, 509, 477 P.2d 733 (1970) (parties may restrict speech in order to prevent "obstruction of or undue interference with normal business operations"); *In re Hoffman*, 67 Cal. 2d 845, 852, 64 Cal. Rptr. 97, 101, 434 P.2d 353 (1967) (protestors not permitted to "interfere[ ] with the conduct of the railroad business").

In the Company's view, that is, the Union's constitutional right to engage in expressive activities does not extend to any activity that interferes with the Mall's primary purpose, namely, "to facilitate the ease of commerce and to promote the business of its merchant tenants." *H-CHH Assocs.*, 238 Cal. Rptr. at 859. According to Fashion Valley, in urging a boycott "what the protestor is asking the customer to do . . . is inherently inconsistent with the dedicated purpose of the shopping

center—the promotion of merchandise and services in the shopping center."

Alternatively, Fashion Valley argues, even if there is no "primary purpose" doctrine in *Pruneyard* and *H-CHH Associates*, the Mall is not a "public forum" under the laws of California and therefore its regulation of expressive activity "need only be reasonable"; yet the Board failed to address the "forum analysis" undertaken by the Supreme Court of California in *Clark v. Burleigh*, 4 Cal.4th 474, 482-489, 14 Cal. Rptr. 2d 455, 460-65, 841 P.2d 975 (1992). Under Fashion Valley's reading of *Clark*, all "property other than streets and parks," and hence the Mall, is a non-public forum.

Finally, Fashion Valley argues that even if the Mall is a public forum, Rule 5.6.2 is a permissible, content-neutral regulation of speech. In *Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal.4th 352, 93 Cal. Rptr. 2d 1, 993 P.2d 334 (2000), the Supreme Court of California, defining a "content-neutral" regulation as a restriction "justified without reference to the content of the regulated speech," 93 Cal. Rptr. 2d at 10, 993 P.2d 334, upheld an ordinance that banned "all solicitation in certain defined places" and "aggressive" solicitation in any public place, 93 Cal. Rptr. 2d at 7, 993 P.2d 334. Fashion Valley maintains Rule 5.6.2 is similarly content-neutral because it "prohibits all boycott appeals directed at the Mall's stores or any of the goods or services sold by Mall merchants, regardless of the subject matter of the protest or the protestor's . . . viewpoint."

The Board disagrees with Fashion Valley on all counts. First, the Board argues Fashion Valley misreads *Pruneyard* and *H-CHH Associates* to mean "California has created a forum open to all speech except for

that criticizing the actions of mall tenants." In the Board's view, the reference in *H-CHH Associates* to "freedom from disruption of normal business operations" means only that a shopping mall may impose appropriate time, place, and manner restrictions on expressive activity.

Second, relying upon the Ninth Circuit's decision in *Glendale Associates, Ltd. v. NLRB*, 347 F.3d 1145 (2003), the Board maintains the Mall is indeed a "public forum" under the State Constitution. In *Glendale* the court read *Pruneyard* to mean "privately-owned shopping centers are required to respect individual free speech rights on their premises to the same extent that government entities are bound to observe state and federal free speech rights." *Id.* at 1154. The Board also adverts to our decision in *Waremart*, in which we held that under California law a grocery store could exclude union hand-billers from its parking lot, but in passing noted that in *Pruneyard* the Supreme Court of California "reasoned that shopping centers had become the functional equivalents of 'miniature downtowns' and should be treated as public forums, from which expressive activity cannot be entirely excluded." 354 F.3d at 872.

Finally, the Board argues Rule 5.6.2 is not content-neutral but rather a "content-based restraint on speech because it facially prohibits persons from urging or encouraging, in any manner, customers not to purchase the merchandise or services offered by any Mall tenant." In *Glendale*, the Ninth Circuit held a shopping mall regulation that prohibited the distribution of written materials mentioning by name any "tenant, owner, or manager" of the mall, 347 F.3d at 1147, was not content-neutral be-

cause it was "based on hostility . . . towards the underlying message expressed." *Id.* at 1157-58. So, too, says the Board of Fashion Valley's ban on boycotts: "Indeed the Shopping Mall admits that it maintains the rule because it disfavors speech that may adversely affect its business."

Neither party's argument is fully persuasive. Each marshals the California case law to advantage, but the fact remains that no California court has squarely decided whether a shopping center may lawfully ban from its premises speech urging the public to boycott a tenant. The case closest in point is *UNITE v. Superior Court of Los Angeles County*, 56 Cal. App. 4th 996, 1020, 65 Cal. Rptr. 2d 838, 854 (2d Dist. 1997), which involved" Prohibition[s] Against Interference With Mall Tenants" very similar to Fashion Valley's Rule 5.6.2. Although the court said the anti-boycott rules "could lead to impermissible content-based regulation of expressive activities" in violation of the State Constitution, it did not determine whether the rules actually were unconstitutional because the issue had not been preserved. 65 Cal. Rptr. 2d at 854-55. The Supreme Court of California we think could reasonably agree with either Fashion Valley or the Board.

III. Conclusion

In sum, whether Fashion Valley violated § 8(a)(1) of the Act depends upon whether it could lawfully maintain and enforce an anti-boycott rule—a question no California court has resolved. Because we owe no deference to the Board's interpretation of the Constitution of California and can only guess how the Supreme Court of California would resolve the issue, we shall certify to that court the following question:

Under California law may Fashion Valley maintain and enforce against the Union its Rule 5.6.2?

Pursuant to Rule 29.3 of the California Rules of Court, we may certify "a question of California law if: (1) the decision could determine the outcome of a matter pending . . . and (2) there is no controlling precedent." Cal. R. Ct. 29.8(a). Here, both requirements are met. Accordingly, we shall hold this case in abeyance pending a response from that court.

So ordered.

WILLIAMS, Senior Circuit Judge, concurring in the certification to the Supreme Court of California.

I write separately to underscore what the decision does not hold and to explain where I depart from the majority's reasoning. First, as Maj. Op. at 244 n.* observes, we take no position on whether a firm connected to a labor dispute or relationship only by virtue of being the landlord of a firm (Robinsons-May) that advertises with the disputing employer (the San Diego Union-Tribune) is subject to the duties (vis-á-vis a union seeking to handbill against the Union-Tribune) that the National Labor Relations Act ("NLRA") imposes on "employers" with respect to their own employees (and unions seeking to represent them). Fashion Valley raised no such issue.

Second, the Board found that, assuming that Rule 5.6.2 violated California law, Fashion Valley had violated § 8(a)(1) both "by maintaining" Rule 5.6.2, *Equitable Life Assur. Soc'y of the United States, et al.*, 343 N.L.R.B. No. 57 at 2 (Oct. 29, 2004), and "by enforcing" the rule, *id.* Fashion Valley didn't challenge the Board's "maintenance" finding; thus we reach no holding on that

issue, and the question of California constitutional law is properly before us (and in turn certified).

But Fashion Valley did challenge the Board's conclusion that it (Fashion Valley) violated § 8(a)(1) "by *enforcing* Rule 5.6.2, i.e., by requiring the instant application for a permit," *id.* (emphasis added), and I cannot agree with the court's reliance on that finding—reliance that appears quite unnecessary in view of the Board's unchallenged "maintenance" conclusion. I see three problems with the majority's enforcement analysis. First, the union's proposed leafleting didn't run afoul of Rule 5.6.2. Although the Board incorporated the ALJ's finding that "the Union's October 4 leafleting had, as its primary object, a consumer boycott of the Mall's Robinsons-May store," *id.* at 1, 7, the majority correctly reverses that finding. See Maj. Op. at 244 (agreeing with Fashion Valley's contention "that there is not substantial evidence the Union intended to boycott any of the Mall's tenants," *id.* at 6). It is hard to see how a firm can "enforce" a rule in an episode to which the rule is irrelevant.

Having removed the factual support from the Board's position, the court goes on to affirm on different grounds, disregarding the familiar principles of *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 87-88, 63 S. Ct. 454, 87 L. Ed. 626 (1943). The court says that "Fashion Valley interfered with the employees' rights" by "subjecting the Union to a permit process that required [the Union] to forswear use of a lawful tactic." Maj. Op. at 244. This evidently rests on the Board's conclusion that "inasmuch as the application process requires adherence to an unlawful rule, [Fashion Valley] *may not enforce it.*" 343 N.L.R.B. No. 57 at

2 (emphasis added). The referent for the word "it" is unclear. The majority reads "it" as the application process. Thus, under the majority's reading, a firm imposing an application requirement "enforces" all of its rules (at least ones that a successful applicant must pledge to obey) anytime that it insists on an application. The majority thus eviscerates much of the distinction between enforcement and maintenance. Fashion Valley maintained Rule 5.6.2, but in no way enforced it.

Alternatively, "it" may refer to Rule 5.6.2. This seems more likely, in view of the Board's finding that the union intended a boycott (which we now reverse), and its later reference to Fashion Valley's "enforcing Rule 5.6.2." *Id.* On this reading, of course, the Board's analysis would founder for want of factual support.

Second, the majority's enforcement theory is further marred by the union's complete unawareness (on the date of the supposed "enforcement") of the very existence of Rule 5.6.2 or its content. The evidence suggests that Fashion Valley excluded the union on October 4 simply because the union refused to apply for a permit, not because Fashion Valley "enforced" Rule 5.6.2 in any non-metaphysical way.

Lastly, the majority notes that under *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 583-87, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988), nothing in the NLRA barred the union from carrying out a secondary boycott by peaceful handbilling. Maj. Op. at 244. True. But of course that tells us little or nothing about the possible affirmative duties of parties subjected to secondary boycotts.

In sum, the majority stretches ordinary language (and the case law) too far—and substitutes its own rea-

soning for the Board's—in concluding that when a company conditions leafleting on submission of an application it automatically "enforces" any rule (that a successful applicant would be required to obey) against persons who have neither contemplated conduct that might violate the rule nor learned of the rule's existence.

APPENDIX D

NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

Case 21–CA–33004

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES AND ITC FASHION VALLEY CORPORATION D/B/A FASHION VALLEY SHOPPING CENTER *AND* GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 432M, AFL–CIO

Oct. 29, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On September 26, 2001, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided

to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[2]

Introduction

The complaint alleges, in pertinent part, that the Respondent violated Section 8(a)(1) by: (1) maintaining a rule prohibiting consumer boycott handbilling, Rule 5.6.2; and (2) enforcing this rule and unlawfully excluding union handbillers at the entrances to the Robinsons-May department store at the Fashion Valley Shopping Center on October 4, 1998. The judge found that the exclusion of the handbillers violated Section 8(a)(1). For the reasons that follow, we agree with this finding.

The judge declined to rule on the separate complaint allegation that the maintenance of the rule prohibiting consumer boycott handbilling also was unlawful. The General Counsel has excepted to the judge's failure to find this additional violation of Section 8(a)(1). For the reasons that follow, we find merit to this exception.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's finding that, under California law, time, place, and manner rules can be applied to labor activity conducted at private shopping malls or large stand-alone shopping facilities in California; and that among the time, place, and manner rules allowed under California law are rules requiring the disclosure of the names of the persons who seek to engage in expressive activity.

[2] We have modified the Order and Notice to more accurately reflect the violations found.

Facts

The judge has fully set out the facts. In brief, the Respondent owns and operates a retail shopping mall in San Diego, California, known as the Fashion Valley Shopping Center (the "Mall"). The Respondent leases space at the Mall to tenants who are engaged in retail sales to the public. The Robinsons-May department store is one of the larger tenants at the Mall and occupies space in a freestanding building at the east end of the Mall. The store is surrounded on three sides by parking areas and on the west side by a separate building housing a Saks Fifth Avenue store and another building housing a number of small retailers. The Respondent retains Jones, Lang, LaSalle Americas, Inc. (La Salle) to manage and operate the Mall on its behalf.

The Respondent has adopted Rules and Regulations applicable to all individuals and organizations seeking to engage in expressive activities at the Mall. Respondent's Rule 5.6.2 expressly prohibits applicants and participants from "impeding, competing, or interfering with the business of one or more of the stores or merchants in the shopping center by . . . urging, or encouraging in any manner, customers not to purchase the merchandise or services offered by one or more of the stores or merchants in the shopping center." Respondent's Rules and Regulations also include an application-permit process for all individuals and organizations seeking to engage in expressive activities at the Mall, which, among other things, requires each applicant to agree to abide by all of the Mall's Rules and Regulations, including Rule 5.6.2. Since the rules were established, the Respondent has required all individuals and organizations

that seek to engage in expressive activity to apply for and receive a permit prior to engaging in the activity.

On October 4, 1998,[3] union members and supporters distributed handbills[4] on the sidewalk outside the entrances to the Robinsons-May department store to persons entering and leaving the store, and to other persons on their way to other Mall stores or parking areas. Shortly after the handbilling began, officials from La Salle stopped the handbilling, and told the handbillers that they were on private property and should have submitted an application for a permit to engage in expressive activity at the Mall. The handbillers were handed the Respondent's standard trespass notice, offered an expressive activity application, and warned that they would be subject to civil litigation and/or arrest if they did not leave. The handbillers promptly ceased their activity, left the Mall's premises, and relocated to public property where they continued to handbill for an additional 15 minutes. On October 22, by letter directed to the Union's counsel, counsel for the Mall sought to compel the Union to complete the Mall's application as a prerequisite to engaging in expressive activity at the Mall.

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[3] All dates hereinafter refer to 1998 unless otherwise indicated.

[4] The Union was involved in a primary labor dispute with the San Diego Union-Tribune newspaper. The handbill highlighted particular aspects of the Union's dispute with the Union-Tribune newspaper, urged Robinsons-May Department Store employees to remain on the job, asked consumers to call the Union-Tribune CEO on behalf of the Union, and concluded: "Robinsons-May advertises with the Union-Tribune."

Analysis

The pertinent principles are set forth in *Glendale Associates*, 335 NLRB 27, 28 (2001), enfd. 347 F.3d 1145 (9th Cir. 2003):

> In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Supreme Court held that an employer may lawfully bar nonemployee union organizers from private property (unless the employees are inaccessible through usual channels). In the absence of a private property interest, however, the Court's holding in *Lechmere* is not controlling. See *Bristol Farms*, 311 NLRB 437, 438 fn. 6 (1993) ("employer's exclusion of union representatives from private property to which the employer lacks a property right entitling it to exclude individuals likewise violated Section 8(a)(1) assuming the union representatives are engaged in Section 7 activities"). See also *Indio Grocery Outlet*, 323 NLRB 1138, 1142 (1997), enfd. sub nom. *NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999).
>
> The Board looks to State law to ascertain whether an employer has a property right sufficient to deny access to nonemployee union representatives. *Bristol Farms*, 311 NLRB at 438. The Board does so because it is State law, not the Act, that creates and defines the employer's property interest. Thus, an employer cannot exclude individuals exercising Section 7 rights if the State law would not allow the employer to exclude the individuals. Id. at 438; *Johnson & Hardin Co.*, 305 NLRB 690 (1991).

California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner rules adopted by the

property owner. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979), affd. 447 U.S. 74 (1980); *Glendale, supra*, 335 NLRB at 28. Rule 5.6.2, however, is essentially a content-based restriction and not a time, place, and manner restriction permitted under California law. That is, the rule prohibits speech "urging or encouraging in any manner" customers to boycott one of the shopping center stores. By contrast, there is no evidence in the record explaining how Rule 5.6.2 regulates the time, place, or manner of speech at the Mall. Rather, it appears that the purpose and effect of this rule was to shield the Respondent's tenants, such as the Robinsons-May department store, from otherwise lawful consumer boycott handbilling. Accordingly, we find that the Respondent violated Section 8(a)(1) by maintaining Rule 5.6.2.[5] See *Glendale, supra*.

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[5] In light of our finding above, we find it unnecessary to rely on the judge's finding that Rule 5.6.2 was impermissible under the California law set forth in *Sears, Roebuck & Co. v. San Diego County Dist. Counsel of Carpenters*, 25 Cal. 3d 317 (1979), *In re Lane*, 71 Cal. 2d 872 (1969), and *Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers' Union*, 61 Cal. 2d 766 (1964), and we do not pass on the judge's discussion of those cases. Accordingly, there is no need for us to address the D.C. Circuit's recent decision in *Waremart Foods v. NLRB*, 354 F.3d 870 (D.C. Cir. 2004), questioning whether *Sears*, *Lane*, and *Schwartz-Torrance* remain good law.

We find it unnecessary to pass on the judge's finding that the Respondent unlawfully maintained a rule limiting expressive activities to six "pre-approved" locations in the common areas of the mall. We rely on the following reason. There was no allegation in the complaint challenging this rule and the General Counsel's cross-exceptions make it clear that the General Counsel does not contend that the Respondent violated the Act by maintaining such a rule. In these circumstances, the question of whether such a rule would be unlawful is not before us.

We find, for similar reasons, that the Respondent also violated Section 8(a)(1) by excluding the handbillers on October 4. The Respondent contends that it was entitled to exclude the handbillers because they did not apply for a permit to engage in handbilling, as its rules require. As noted above, though, the Respondent's application-permit process requires each applicant to agree to abide by all its rules and regulations, including Rule 5.6.2, which we have already found to be unlawful. Thus, inasmuch as the application process requires adherence to an unlawful rule, the Respondent may not enforce it. Accordingly, we find that the Respondent violated Section 8(a)(1) by enforcing Rule 5.6.2, i.e., by requiring the instant application for a permit.

AMENDED CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by maintaining and enforcing a rule prohibiting handbilling or other expressive activity which urges, or encourages in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the Fashion Valley Shopping Center.

4. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated Section 8(a)(1) of the Act in any other manner except as specifically found herein.

ORDER

The National Labor Relations Board orders that the Respondent, Equitable Life Assurance Society and ITC Fashion Valley Corporation d/b/a Fashion Valley Shopping Center, San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a rule prohibiting handbilling or other expressive activity protected by Section 7 of the National Labor Relations Act which urges, or encourages in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the Fashion Valley Shopping Center.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Delete from its rules and regulations, and any other document within its custody and control where such rules may be contained, any rule which prohibits handbilling or other expressive activity protected by Section 7 of the National Labor Relations Act which urges, or encourages in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the Fashion Valley Shopping Center.

(b) Within 14 days after service by the Region, post at the facilities it maintains in connection with the operation of the Fashion Valley Shopping Center in San Diego, California, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 4, 1998.

(c) Within 14 days after service by the Region, sign and return to the Regional Director sufficient copies of the notice for posting by the Union at its facility, if willing, at all places where notices to members and employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 29, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a rule at the Fashion Valley Shopping Center prohibiting handbilling or other expressive activities protected by Section 7 of the National Labor Relations Act which urges, or encourages in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the Fashion Valley Shopping Center.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL modify our rules and regulations for expressive activities at Fashion Valley Shopping Center, and any other document within our custody and control where such rules may be contained, to delete any rule which prohibits handbilling or other expressive activity protected by Section 7 of the National Labor Relations Act which urges, or encourages in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the Fashion Valley Shopping Center.

* * * * *

APPENDIX E

[Seal Omitted]
United States Government
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

August 30, 2006

BY FEDERAL EXPRESS

Frederick K. Ohlrich
Court Administrator and
Clerk of the Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: S144753 - *Fashion Valley Mall v. NLBR* (California Supreme Court)

Dear Mr. Ohlrich:

We have received your August 16, 2006 order, advising us that you have accepted the request of the United States Court of Appeals for the District of Columbia Circuit in *Fashion Valley Mall LLC v. NLRB*, No. 04-1411 (D.C. Cir. June 16, 2006) for an answer to a certified question of law. We appreciate your continuing to keep us advised about the status of the case. Any future correspondence should be directed to Aileen A. Armstrong, who is NLRB counsel of record in the federal court proceedings.

The purpose of this letter is to inform you that the National Labor Relations Board does not intend to participate in the resolution of the certified question. In the Board decision under review by the District of Columbia

Circuit, *Equitable Life Assurance Society*, 343 NLRB No. 57, Board Case No. 21-CA-33004, the Board was merely attempting to give effect to its understanding of California property law. The Board has no institutional interest in how California resolves the state property law question that the District of Columbia Circuit determined was unclear and accordingly certified to this Court.

As suggested by a representative of your office, we have served a copy of this letter on counsel for the parties with an interest in the resolution of the state property law question before the Court. The property owners here are: Fashion Valley Mall, LLC; Equitable Life Assurance Society of the United States; ITC Fashion Valley Corporation d/b/a Fashion Valley Shopping Center. Those seeking access to the property are represented by Graphic Communications International Union, Local 432M, who we understand has moved to intervene in this state court proceeding.

Thank you for your attention in this matter. Please feel free to contact me should you wish to discuss this matter further.

Sincerely,

/s/ AILEEN A. ARMSTRONG
AILEEN A. ARMSTRONG
Deputy Associate General Counsel
National Labor Relations Board
Appellate Court Branch
202-273-2960